FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1407

JAMES TRAINOR, et al.,

Appellants,

vs.

JUAN HERNANDEZ, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY BRIEF AND ARGUMENT OF APPELLANTS JAMES TRAINOR AND VIVIAN O'MALLEY

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I.

THE APPEAL OF TRAINOR AND O'MALLEY CANNOT BE AFFECTED BY THIS COURT'S DISPOSITION OF THE APPEAL OF ELROD AND FINLEY.

Appellees state that appellants Finley and Elrod filed a timely notice of appeal but failed to file a jurisdictional statement, thereby subjecting their appeal to dismissal pur-

suant to United States Supreme Court Rule 14(3). They next curiously conclude that if the Court dismisses the appeal of Finley and Elrod, the injunction restraining them and the class they represent from enforcing the Illinois Attachment Act may not be challenged by Trainor and O'Malley even though it is clear that these appellants filed a timely notice of appeal and jurisdictional statement, and had their appeal properly docketed in this Court. The inference drawn by appellees is that even if appellants Trainor and O'Malley "were to prevail on the appeal of the injunction against them, they could still not obtain prejudgment attachments since all clerks and sheriffs are enjoined from issuing and executing writs of attachment." (appellees' brief, pp. 17-18).

It would be extraordinary indeed if the right to a full and complete review were denied to litigants by this Honorable Court where the record readily demonstrates that they have perfected their appeal in a timely fashion because of the action or inaction of another set of litigants. It is manifest that appellants Trainor and O'Malley have no control over the conduct of appellants Finley and Elrod or their attorneys, and no conduct of theirs ought to be imputed to appellants Trainor and O'Mally, nor should any vicarious responsibility be placed upon appellants Trainor and O'Malley for that conduct.[1] It is submitted that appellants Trainor and O'Malley have properly perfected their appeal, and are entitled to any and all relief appropriate to the merits of their cause.

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[1] Appellants Trainor and O'Malley do not intend to imply any error in the conduct of appellants Elrod and Finley, and in fact support their position taken in regard to this matter in point I of their reply brief. It is only submitted that whatever action this Court deems appropriate with regard to their appeal should have no effect upon the appeal of Trainor and O'Malley.

II.

THE PRINCIPLES OF YOUNGER v. HARRIS AND HUFFMAN v. PURSUE, LTD. REQUIRE THAT THIS SUIT BE DISMISSED.

It is plain, beyond doubt, that a federal court injunction restraining a pending state court proceeding is an extraordinary remedy to be exercised only in exceptional circumstances, and not as a matter of course. As a matter of fact, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions". *Younger* v. *Harris,* 401 U.S. 37, 45, 27 L.Ed.2d 669, 676 (1971).

In *Mitchum* v. *Foster,* 407 U.S. 225, 32 L.Ed.2d 705 (1972) this Court recognized that the Anti-injunction statute (28 U.S.C. §2283) "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding" unless the injunction is authorized by an Act of Congress, necessary in aid of the federal court's jurisdiction, or necessary to protect or effectuate the federal court's orders. The Anti-injunction statute applies by its literal terms equally to pending state criminal and civil actions. While the Court recognized in *Mitchum* that §1983 is an exception to the Anti-injunction statute as "authorized by an Act of Congress, it, by no means, gave federal district courts *carte blanche* authority to issue injunctions restraining state court proceedings every time a plaintiff files an action under the auspices of §1983. Rather, in concluding as it did, the Court did not "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 U.S. at 243, 32 L. Ed.2d at 718); it indicated that these "principles of equity, comity and federalism" were "canvassed at length" in

Younger v. *Harris,* 401 U.S. 37, 27 L.Ed.2d 669 (1971), and that they had been "emphasized by this Court many times in the past." 407 U.S. at 243, 32 L.Ed.2d at 718. The matter before the Court was then remanded to the federal district court for consideration of whether an injunction ought to issue to stay a state court proceeding under the circumstances of that case.

Although *Younger* v. *Harris* was decided in the context of a state criminal proceeding, it provides, as the Court said in *Mitchum,* a lengthy canvass of the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding. This Court held in *Younger* that the concept of federalism adopted by the framers of the Constitution "is a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the states." 401 U.S. at 44, 27 L.Ed.2d at 676. The Court found that "in view of the fundamental policy against federal interference with state criminal prosecutions. even irreparable injury is insufficient unless it is 'both great and immediate.'" (401 U.S. at 46, 27 L.Ed.2d at 676), and further stated that the possibility that a statute may be unconstitutional on its face will not justify an injunction against a good faith attempt to enforce it. 401 U.S. at 54, 27 L.Ed.2d at 681.

Mr. Justice Stewart in a concurring opinion indicated that examples of circumstances demonstrating great and immediate irreparable injury "might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, or if there has been bad faith

and harassment—official lawlessness—in a statute's enforcement. 401 U.S. at 56, 27 L.Ed.2d at 682 (citations omitted).

In *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 43 L.Ed.2d 482 (1975) this Court extended the rationale of *Younger* and its predecessor cases to a pending state civil matter, and held that the district court should have applied *Younger* principles in determining whether to proceed on the merits of the cause presented. In arriving at its conclusion the Court noted that a rule requiring strict observance in these kinds of cases was that no injunction ought to issue against officers of the State except in a case free from doubt and only when necessary to prevent great and immediate irreparable injury (420 U.S. at 603, 43 L.Ed.2d at 492) and reiterated that federal court intervention is proper only where the district court finds that,

> the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' "

420 U.S. at 611, 43 L.Ed.2d at 496

It is respectfully submitted that the present cause, when viewed against the backdrop of the decisions just surveyed, will not support federal intervention by means of an injunction restraining the employment of the Illinois Attachment Act by state officials in aid of a lawful state purpose.

A.

Appellees Failed To Demonstrate Great And Immediate Irreparable Injury.

It should be noted at the outset that there was no demonstration whatever in the cause before the district court

of irreparable injury, much less great and immediate irreparable injury on behalf of the appellees, which would warrant federal intervention under the principles enunciated by this Court. While appellees make the bare allegation in their complaint that they "have suffered and continue to suffer irreparable injury" (A. 11, paragraph 19 of the complaint) and in an affidavit in support of their motion for a temporary restraining order[2] that they need the money which is the subject of the attachment (A. 25), they make no allegation that the Illinois Attachment Act was employed by state officials in bad faith to harass them or that the Illinois Attachment Act constitutes a flagrant and patent violation of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it.

It is likewise noteworthy that the district court made no finding whatever of irreparable injury in either its final order (A. 65-67) or its memorandum opinion (A. 68-77)—apparently for the reason that none had been demonstrated. The district court likewise made no finding that the Attachment Act was employed by state officials in bad faith to harass appellees or that the Act constituted a patent and flagrant violation of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it in either its final order or its memorandum opinion. The district court only found in its order (A. 65-66, par. 1) and memorandum opinion (A. 77) that the Illinois

[2] It is interesting to note that no temporary restraining order was ever entered because the appellees came to a settlement which resulted in the release of a portion of the money which was attached.

Attachment Act "on its face" was "patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." As previously indicated such a finding, under the decisions of this Court, is insufficient to justify federal intervention by means of an injunction in a pending state court proceeding. *Younger* v. *Harris,* 401 U.S. 37, 54, 27 L.Ed.2d 669, 681 (1971); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 612, 43 L.Ed.2d 482, 496 (1975).

It is therefore, submitted that the failure of appellees to plead or prove and the failure of the district court to recognize any extraordinary circumstances constituting great and immediate irreparable injury is sufficient reason by itself to reverse the district court's decision.[3]

B.

The State Court Proceedings Afforded Appellees An Effective And Speedy Remedy For Their Federal Claim.

At the outset it should be recognized that the objections which appellees advance as to the adequacy of their remedy in the state court (appellees' brief, pp. 26-35) would, if embraced by this Court, effectively nullify the holdings of *Younger* and *Huffman.* Those cases are clear in their expression of the recognized exceptions to the doctrine of federal court deference to pending state court proceedings. State court proceedings are not to be interfered with "unless it *plainly appears* that [the defense of the state suit] would not afford adequate protection" (*Younger,* 401 U.S.

[3] Appellees appear to recognize that they have failed to plead or prove great or immediate irreparable injury, in fact, since they argue at page 25 of their brief that "the deprivation of one's constitutionally protected property rights must be seen as irreparable *per se.*"

at 45, 27 L.Ed.2d at 676 (emphasis added))—that is, unless extraordinary circumstances are present. *Younger,* 401 U.S. at 41, 27 L.Ed.2d at 674. The question thus is whether the appellees will suffer great and immediate irreparable harm as a result of the state court proceedings, and not whether appellees can conjure up some imaginary set of circumstances in which they might not be afforded as sweeping relief as they would like. *Kugler* v. *Helfant,* 421 U.S. 117 at 124-25, 44 L.Ed.2d 15 at 24-25, 95 S.Ct. 1524 (1975).

Quite clearly the state trial court had the power to quash the attachment on the basis that it was unconstitutional, and state procedures provided the means for the plaintiffs to obtain this relief. Appellees, themselves, do not dispute this. Immediately upon being served with the writ of attachment and complaint, appellees could have filed a motion to quash the attachment on the grounds that it violated their due process rights.[4]

Technically speaking, as appellees point out (appellees' brief, p. 27), a state trial court declaration that the attachment violated their due process rights would protect appellees only as to the single attachment in question and would not protect the appellees' class. However, to construe this technicality as rendering appellees' state court remedy inadequate requires the Court to *assume* bad faith on the part of state officials and the state court—something which this Court expressly refused to do in *Huffman.* 420 U.S. at 611, 43 L.Ed.2d at 496. As a matter of practice, state

[4] Illinois Supreme Court Rule (Ill. S.C.R.) 184, discussed more fully at point III, *infra,* provides that a party may file and call up a motion for disposition at any time. Illinois Supreme Court Rules are made applicable to attachment proceeding pursuant to the express provisions of the Illinois Attachment Act (§26) (A. 43).

officials and the state court, in accord with their constitutional responsibilities, abide by a declaration of unconstitutionality, subject to appeal. Such an appeal, which would go directly to the Illinois Supreme Court[5], would provide a speedy resolution of the issue, legally binding on all state courts.

Moreover, to accept appellees' technical objections would wholly undercut *Huffman* and *Younger,* since the same objections could have been urged in those cases. Defense of the state suits in those cases would not have removed the threat of future state suits in those cases either. The state suit in the instant case gave the appellees an opportunity to get far more protection than was available in *Younger* and *Huffman,* because appellees could have filed a third party complaint against at least the Sheriff and Clerk of Cook County[6]. Presumably, this course would not have been available in *Younger* and *Huffman* since those actions were criminal and quasi-criminal in nature.

The appellees' contention that their defense of the state suit could not afford adequate protection to the appellees' class and that, therefore, it was proper for the district court to exercise its jurisdiction in this case (appellees'

[5] Illinois Supreme Court Rule 302(a) provides for direct appeals when a state statute is held invalid.

[6] As appellees point out, the intricacies of class actions are not settled in Illinois. Plaintiff and defendant class actions are, however, permissible, and there is no bar to maintaining such a suit as a third party suit. Appellees' contention that defendant class actions are not allowed is refuted by practice in the Illinois courts and one of the cases cited by appellees. *Gaffney* v. *Shell Oil Co.,* 19 Ill.App.3d 987, 312 N.E.2d 753 (1974). In any event, the lack of clarity of the law in Illinois is just another reason for the federal courts to defer to the state courts.

brief, pp. 29-30) is a bootstrap argument. When they brought their federal suit the named appellees were engaged in a pending state court proceeding and had an adequate remedy available there. Thus, the district court should have deferred to the state court immediately. Appellees are attempting to argue that by naming a class they enhanced their own standing to be in the federal courts, and thereby avoided *Younger* and *Huffman*. Such a theory seems a clear violation of class action principles since the named appellees could not have maintained their suit under *Younger* and *Huffman* without naming a class and the appellees' class could not have maintained a suit without the named appellees. *See Sosna* v. *Iowa*, 419 U.S. 393 at 402-403, 42 L.Ed.2d 532 at 542, 95 S.Ct. 553 (1975); *O'Shea* v. *Littleton*, 414 U.S. 488 at 494, 38 L.Ed.2d 674 at 682, 94 S.Ct. 669 (1974).

The adequacy, effectiveness and speed of appellees' state court remedy can be amply demonstrated. The attachment suit against appellees was instituted on October 30, 1974, and appellees were served with the writ and complaint on November 5th. The hearing on that attachment was scheduled to come before the court no later than December 19, 1974—nearly a full year before the district court's judgment in this case. At that hearing appellees could have attacked the attachments on constitutional or any other grounds.[7]

Assuming that the Illinois Act is as patently violative of appellees' rights as they assert, the Circuit Court of Cook

[7] As indicated at note 1, *supra*, and explored more fully in point III, *infra*, appellees had the right to call for an immediate hearing on a motion to quash the attachment. Ill. S.C.R. 184.

County—a court not known for its conservatism in such matters—would surely have sustained an attack on the statute and entered an order quashing the attachment. The State would then, as is its custom in all cases where one of its statutes has been held unconstitutional, have sought an immediate appeal. Such an appeal would be available either pursuant to Illinois Supreme Court Rule 308 (interlocutory appeals)[8] or, as appellees point out (appellees' brief, pp. 32-33), pursuant to Illinois Supreme Court Rule 304 (appeals from final judgments as to fewer than all claims).[9] As is invariably the case where a statute has been held unconstitutional, the request for an interlocutory appeal (Ill. S.C.R. 308) or the request that the trial court declare its order final and appealable (Ill. S.C.R. 304) would be granted. Under either procedure the trial court could, and in all

[8] Illinois Supreme Court Rule 308 in relevant part provides:

(a) *Requests.* When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

[9] Contrary to the assertion in appellees' brief (pp. 32-33), appeals from ruling on matters relating to attachment are not limited to the procedure provided by Illinois Supreme Court Rule 304. The case upon which appellees rely in making this assertion (*Smith* v. *Hodge*, 13 Ill.2d 197, 148 N.E.2d 793 (1959)) holds only that an order quashing an attachment is not a final appealable order. Section 26 (A. 43) of the Illinois Attachment Act specifically makes all Illinois Supreme Court Rules applicable to attachment cases, and Section 40 (A. 48) provides for appeal as in other civil cases.

probability would, stay further proceedings on the underlying debt claim.

Once the appeal was allowed, it would go directly to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 302(a), which provides for direct appeals to that court where a state statute has been held invalid. If the appeal were an interlocutory one, the State's brief would be due in 35 days, the appellees' brief due 35 days later and the reply brief due 14 days after that. Ill. S.C.R. 308(d), 343(a). Argument before the court would in the usual case come at the next session of the court, which holds sessions every two months beginning in January, with the exception of July and August. The court's opinion could be expected within two to four months. The above schedule assumes the usual case and not one in which a state statute has been held unconstitutional. In such a case an accelerated briefing and argument schedule may well be imposed either at the instance of the parties or on the court's own motion.

While the above scenario is necessarily speculative, it is certainly less strained than that which the appellees advance (appellees' brief, pp. 32-35). It is also based upon Illinois practice experience and not on imagination. This is clearly evident from the procedural course followed in a case recently decided by the Illinois Supreme Court. In *First Finance Co.* v. *Pellum,* 62 Ill.2d 86, 338 N.E.2d 876 (1975) a judgment creditor instituted a wage deduction proceeding (Ill. Rev. Stat. 1973, ch. 62, §71 et seq.) against its debtor's employer—the State of Illinois. Under the procedure provided for wage deductions, which is similar to that under the Illinois Attachment Act, the creditor instituted his suit by filing an affidavit for a wage deduction on December 20, 1974, and set a return date of February 26,

1975. The State, as garnishee, filed a motion to quash the wage deduction summons and to dismiss the case on the basis that the State was immune from garnishment, and called the matter for hearing on February 13th. The State's motion was denied on March 10th. The State then requested permission to take an interlocutory appeal (Ill. S.C.R. 308), which was granted, and thereafter, requested the Illinois Supreme Court to allow a direct appeal on the grounds that the public interest required an expeditious determination. Ill. S.C.R. 308(b). The court allowed the appeal as a matter of its discretion[10] and ordered an accelerated briefing schedule. The case was argued in a special June session of the court and the court's opinion was filed on September 26, 1975—only ten months after the suit was filed in the trial court. This is to be compared to the 13½ month period between the State's filing its attachment complaint in this case on October 30, 1974, and the district court's judgment on December 15, 1975.

Assuming that the Illinois trial court were to uphold the Illinois Act and deny a motion to quash the attachment, then appellees could have followed the same interlocutory appeal route outlined above, except that a direct appeal to the Illinois Supreme Court would have been discretionary, as in the *First Finance* case.

If an interlocutory appeal were denied and the trial court refused to declare its order final and appealable—a highly unlikely event where the validity of a state statute is involved—an appeal would have to await a final judgment

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10 In the instant case, the appeal would be as a matter of right Ill. S.C.R. 302(a).

order after adjudication of the underlying debt claim. Assuming that appellees lost on the merits of this claim, an appeal would lie directly to the Illinois Supreme Court if the attachment provision of the Illinois Act had been found unconstitutional and as a matter of discretion if the attachment provisions upheld. The case would not be moot, as appellees assert (appellees' brief, p. 33) because a stay of enforcement of the judgment could be obtained pursuant to Illinois Supreme Court Rule 305. If the appellees prevailed on the merits, an appeal of the attachment issue would still lie under an exception to the usual rule of mootness. In Illinois a case will not be dismissed on appeal for mootness if an issue of substantial public interest is presented. In determining the existence of a public interest question in a particular case, courts will consider the public or private nature of the issue presented, the likelihood of recurrence of the issue, and the desirability of an authoritative determination for the future guidance of public officers. *People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618, 622, 104 N.E.2d 769 (1952); *Save-At Builders Products Co.* v. *American Federation of State, County and Municipal Employees,* 13 Ill.App.3d 846, 301 N.E.2d 67 (1973); *Kern* v. *Chicago & Eastern Illinois R.R. Co.,* 44 Ill.App.2d 468, 195 N.E.2d 197 (1963). Clearly, the instant case falls within this exception.

It is, therefore, submitted that appellees had a speedy and effective state court remedy which would have adequately protected their federal rights and the district court should have declined jurisdiction for this reason.

C.

An Attachment Action Is A Proceeding In The State Court.

Whatever the vitality of the 4-3 decisions in *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972) and *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 31 L. Ed. 2d 424, 92 S.Ct. 1113 (1972), those cases are clearly inapposite here. As the district court found, Illinois attachment proceedings are "proceedings in a state court" (A. 70.[11] They are not, as appellees assert (appellees' brief, p. 35-42), extrajudicial proceedings.

Under the Illinois Act, attachment is one means of commencing a suit against a debtor on some contract or tort claim. In the case of a tort claim there is direct judicial participation in the proceeding prior to the attachment, since the creditor must appear before a judge to be examined on his cause of action before a writ of attachment will issue (§ 2) (A. 29-30). In contract actions the creditor must apply to the clerk of the court, who is an officer of the court, for the writ. The writ is executed upon the property to be attached by the sheriff (§ 8) (A. 35). The attachment itself, separate and apart from the underlying claim, is a *suit* against property whereby the court obtains *in rem* jurisdiction upon the execution of the writ. *Field* v. *Shoop,* 6 Ill. App. 445 (1880). It is thus evident that an attachment is a proceeding in a state court from its inception and cannot in any sense be characterized as extrajudicial once the property is attached.

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[11] The appellees have not taken a cross-appeal in this case, and thus have questionable standing to contest the district court's judgment in this or any other regard. *United States* v. *Yorfine,* 412 F.2d 329 (5th Cir. 1969).

Service of the writ upon the debtor confers *in personam* jurisdiction upon the court (§ 10) (A. 35) and the debtor may immediately move the court to quash the attachment (§ 27) (A. 44); Ill. S.C.R. 184. Thus, the court's continuing participation in the attachment proceeding is obvious.

The sheriff, as an officer of the court (or the garnishee in the case of garnishment), holds the attached property subject to the control of the court (§§ 14, 21) (A. 38, 41). If the debtor prevails on the underlying claim or has the attachment quashed, the sheriff must, pursuant to the court's judgment, return the property to the debtor. If the creditor prevails, the sheriff continues to hold the property until the creditor executes upon the judgment as in any civil case (§§ 34, 36) (A. 46, 47). The attached property is *under the control of the court* from the time it is attached. *Benjamin Harrison & Co.* v. *Western Smelting & Refining Co.*, 322 Ill. App. 609, 54 N.E. 2d 900 (1944).

The Illinois proceeding is thus totally unlike that in *Fuentes* where the creditor obtained possession of the property in an extrajudicial proceeding or that in *Lynch* where there was a total lack of court supervision and the state officials were acting as agents of the creditor. This Court in *Lynch* specifically noted that the statute in that case was one of the few state statutes which allowed garnishment without any participation by the court, and that a debtor had minimal opportunity for relief from the garnishment at best. 405 U.S. at 555, 31 L.Ed.2d at 436. In Illinois the court has jurisdiction and complete control over the attached property from the instant it is attached. The sheriff holds the property under the court's supervision both for the benefit of the creditor and debtor.

Gerstein v. *Pugh*, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975) has no application to the present case for the same reasons that *Lynch* and *Fuentes* do not. Plaintiffs in *Gerstein* were being held in custody merely on a prosecutor's information without judicial participation of any kind and without the right to a judicial hearing. Plaintiffs there brought suit in the federal court claiming a right to a judicial hearing. In other words, the federal suit in *Gerstein* could not have interfered with a pending state court proceeding in any manner since none existed. The federal suit in *Gerstein* was brought to compel state officials to bring a state court proceeding, and not as in this case to cut short the pending state court proceeding.

III.

THE PROCEDURES PROVIDED IN THE ILLINOIS ATTACHMENT ACT COMPORT WITH DUE PROCESS OF LAW.

The district court and the appellees focus on three alleged deficiencies in the Illinois Act which they assert render it unconstitutional: 1) that the Act does not require the creditor to set out specific facts in his affidavit for attachment, but authorizes the writ to issue upon conclusory allegations; 2) that the creditor need not present his affidavit to a judge before the writ will issue, but only to a clerk; and 3) that the Act does not provide for an immediate post-seizure hearing for the debtor (court's opinion, A. 76-77; appellees' brief, pp. 50-51). It is evident from the above that the court reached its conclusion as to the unconstitutionality of the Illinois Act by a mechanical application of *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 40 L. Ed.2d 406, 94 S.Ct. 1895 (1974), rather than following the admonition of *Mitchell* that there is no strict rule as to the

requirements of due process. Nevertheless, it is helpful to explore the three requirements of due process which the district court found the Illinois Act lacked for the purpose of demonstrating the validity of the Act.

First, the conclusion that the Act is deficient because it does not require that specific facts be alleged prior to attachment is obviously without foundation. A comparison between *Mitchell* and the present case easily establishes this. In *Mitchell,* the creditor alleged the sale of certain items to the debtor, that the unpaid purchase price of the items was overdue, and that demand therefore had been made. The creditor also merely alleged that he had reason to believe the debtor would dispose of the items, absent sequestration. 416 U.S. at 601-02, 40 L.Ed.2d at 410. In the instant case the appellants alleged that appellees Juan and Maria Hernandez applied for public aid while concealing monies on deposit in their credit union account, and that as a result of that concealment, appellants were obliged to provide public assistance in the sum of $3,720.20 to which appellees were not entitled.[12] Clearly, the facts alleged in the present case are just as specific as the facts alleged in *Mitchell.* Both allege facts revealing the basis of the debt. Additionally, the factual allegations in the present case support the grounds for attachment—fraudulent concealment of property. The creditor in *Mitchell* failed to support his assertion that the debtor would dispose of the property absent sequestration by any factual allegations. There-

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12 These facts were alleged in the complaint (A. 14-16) and not the affidavit for attachment (A. 17-19). However, an examination of the affidavit reveals that the complaint is incorporated therein and that the affidavit can only be used on this basis (A. 17). The facts in both documents are sworn to.

fore it can be plainly seen that there is no basis for the district court's finding that allegations supporting the attachment in this case were too conclusory.

Second, the court concluded that the Illinois Act was defective because the creditor need not present his affidavit to a judge. At the outset it must be pointed out that this conclusion is erroneous as to tort claims. In tort actions the creditor must apply to a judge and "be examined, under oath, by such judge concerning the cause of action" (§2, A. 29-30). The district court's conclusion that in tort cases the judge's inquiry is limited to the amount of damages is at direct odds with this provision of the Act and is unsupported in the record. Thus, at least as to tort claims the district court was clearly incorrect in finding the Act unconstitutional and at a minimum should be reversed as to tort claims brought under the Illinois Act.

It is true, however, that with contract claims the creditor need not go before a judge to obtain an attachment. It is appellants' position that this is not a defect significant enough to render the Act unconstitutional. The function of a preattachment, ex parte appearance before a judge is necessarily limited to ensuring that the creditor's claim is legally sufficient. The creditor who would abuse the attachment process by lying in his affidavit would lie just as readily before a judge. The debtor finds security from abuse of the process via a post-seizure hearing and/or the creditor's bond. The likelihood of an attorney for a creditor pleading a legally insufficient contract case is so slight as to be insignificant. As this Court noted in *Mitchell* (416 U.S. at 609, 40 L.Ed.2d at 415):

> These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it

> comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof.

Third, the court's conclusion that the Act does not provide for an immediate post-seizure hearing is true only in the sense that the Act does not expressly so provide. It does provide for a timely hearing within 10 to 60 days of the attachment (§§6, 25) (A. 33-34, 43). More importantly, it provides that the Illinois Civil Practice Act and Supreme Court Rules apply to attachment proceedings (§26) (A. 43). Illinois Supreme Court Rule 184 provides:

> No provision in these rules or in the Civil Practice Act prescribing a period for filing a motion requires that the motion be heard within that period. Either party may call up the motion for disposition before or after the expiration of the filing period.

This provision is regularly employed in practice before the Illinois courts. While the Illinois Attorney General's office has no experience in quashing attachments, this office has on numerous occasions in the past quashed garnishments against the State. Under provisions of the garnishment act (Ill. Rev. Stat. 1973, ch. 62, §71 et seq.) a garnishment summons is returnable not less than 60 nor more than 70 days after issuance. This office routinely filed motions to quash, set a hearing thereon, and had the garnishment quashed before the return date.

Appellees alleged in their complaint and later supported by affidavit that they appeared in the state court on November 19, 1974, the first return date of the attachment, and demanded an immediate hearing and that they were informed that the matter had been continued (A. 10, 25). They do not state, however, that they appeared to present

a motion to quash or whether they appeared during motion call, when such a motion would be considered. Their allegation is so vague that it is impossible to draw an inference from it that a debtor cannot employ Supreme Court Rule 184 to gain an immediate hearing on the attachment. To the extent that their allegation casts any doubt on the immediate availability of a hearing on the attachment under Illinois law, another reason is presented why the district court should not have interferred with the pending state court attachment proceeding. The state courts should have been left with the opportunity to interpret Illinois law.

The above mechanical analysis establishes that the Illinois Act comports with due process since it affords the safeguards similar to those present in *Mitchell.* Appellants presented a more functional analysis of the Act, as is required by *Mitchell,* in their original brief, which need not be restated here. One point should be reemphasized however. The Illinois Act is very narrowly drawn, encompassing only those situations where the threat to the security of the creditor is great, indeed. This fact, which was not present in *Mitchell,* must be weighed in the balance.

CONCLUSION

For the foregoing reasons, appellants respectfully request that this Honorable Court vacate the judgment of the district court, because that court failed to defer to the Illinois state court for a resolution of the due process issue presented in a pending state attachment proceeding.

In the alternative, appellants request that the district court's judgment be reversed on the basis that the procedures prescribed by the Illinois Attachment Act comport with principles of due process.

Respectfully submitted,

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